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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

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315 U.S. 871

No. 957

ALFONSE DOBRUSKY,

Petitioner,

vs.

STATE OF NEBRASKA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

BERNARD M. SPENCER,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
Summary statement of matters involved	1
Reasons relied on for the allowance of the writ	4
Prayer for writ	5
Brief in support of petition for writ of certiorari	7
I. Opinion of the court below	7
II. Jurisdiction	7
III. Statement of the case	9
IV. Specifications of errors	9
V. Argument	10
Summary of argument	10
Point A—Conflict with the provisions of the Constitution of the United States	10
Point B—Conflict with state court decisions	11
Conclusion	14

Table of Cases Cited.

Bramlett v. *State*, 129 Neb. 180, 261 N. W. 166	8, 13
Cole v. *Swan*, 4 G. Green, Ia. 32	8
Cooney v. *State*, 61 Neb. 342, 85 N. W. 281	8, 12
Gandy v. *State*, 24 Neb. 716	8, 11, 12
Hare v. *State*, 4 How. (Miss.), 187	9
Hoberg v. *State*, 3 Minn. 181	9
McClary v. *State*, 75 Ind. 261	8
Mattox v. *United States*, 146 U. S. 140, 36 L. Ed. 917, 13 Sup. Ct. 50	9, 14
People v. *Knapp*, 42 Mich. 267, 3 N. W. 927	8, 12, 13
Pickard v. *State*, 74 Ind. 275	8
Slaughter v. *State*, 24 Texas 410	9
State v. *Cartwright*, 20 W. Va. 34	9
State v. *Robinson*, 20 W. Va. 743	9
State v. *Scholl*, 118 Kans. 629, 236 Pac. 816	9
State v. *Simon*, 101 N. J. L. 11, 127 Atl. 570	8, 13
State v. *Snyder*, 20 Kans. 306	9, 13

Table of Constitutional Provisions Cited.

	Page
Fifth Amendment to the Constitution of the United States, U. S. C. A. Const., Part 2, p. 517	4, 10, 11
Sixth Amendment to the Constitution of the United States, U. S. C. A. Const., Part 2, p. 566	5, 11
Fourteenth Amendment to the Constitution of the United States, U. S. C. A. Const., Part 3, p. 334	5, 8, 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 957

ALFONSE DOBRUSKY,
Petitioner and Plaintiff in Error Below,

vs.

STATE OF NEBRASKA,
Respondent and Defendant in Error Below.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

The petitioner was informed against in the District Court of Otoe County, Nebraska, on the 9th day of October, 1939, by the County Attorney of said County, charging the petitioner with the crime of manslaughter (R. 1). Thereafter on the 13th day of February, 1940, the petitioner pleaded not guilty to said charge (R. 2). Said cause was

called for trial in the District Court of Otoe County, Nebraska, on the 27th day of February, 1940 (R. 2) and said trial continued through the 28th of February, 1940, at which time the jury in said case in the District Court of Otoe County, Nebraska, retired for deliberation at 4:20 o'clock P. M. (R. 3). On the 29th day of February, 1940, at 9:15 o'clock A. M. the said jury returned a verdict into court finding the defendant guilty as charged in the amended information of the County Attorney (R. 3). On March 2, 1940, petitioner filed a motion for new trial in the District Court of Otoe County, Nebraska (R. 4-8), and on March 3, 1940, he filed an amendment to said motion for new trial in said court (R. 8-9). On April 13, 1940, the District Court of Otoe County, Nebraska, overruled the petitioner's motion for new trial and sentenced the petitioner to the Nebraska State Penitentiary at Lancaster, Nebraska, for an indeterminate period of one to three years (R. 11-12).

On April 13, 1940, the petitioner gave notice of appeal and notice of his intention to apply for a writ of error to the Supreme Court of the State of Nebraska (R. 9). There was entered by said District Court of Otoe County, Nebraska, an order for suspension of sentence and judgment to enable defendant to apply for a writ of error, which order was entered by the District Court of Otoe County, Nebraska, on the 13th day of April, 1940 (R. 10).

Said cause was by the Supreme Court of Nebraska ordered submitted to said Court on March 19, 1941 (R. 44) and afterwards on the 1st day of August, 1941, said Court affirmed the judgment of the District Court of Otoe County, Nebraska (R. 44), and on the same day said Supreme Court of the State of Nebraska filed an opinion in said case (R. 45-51).

On the 9th day of August, 1941, the petitioner filed his motion for re-hearing in the Supreme Court of the State

of Nebraska (R. 52-53). On the 17th day of November, 1941, the Supreme Court of the State of Nebraska overruled and denied a re-hearing in said case (R. 53).

Only the material part of the record is submitted to this Court. (See stipulation of Attorney General for the State of Nebraska, and attorney for respondent (R. 54-55)).

The principal question involved in said appeal to the Supreme Court of the State of Nebraska was as to whether the said petitioner had a fair and impartial trial by jury in the District Court of Otoe County, Nebraska, and that said trial constituted a violation of the petitioner's constitutional rights to a fair and impartial trial by jury, without interference of the deliberations of the jury by an outside person. It was affirmatively shown by the affidavit of Herman Spier, a member of the jury (Ex. "D") (R. 12) that George T. Johnson, the bailiff of the District Court of Otoe County, Nebraska, and the sworn officer in charge of said jury, remained in the presence of the jury and with the jury for a period of about five and one-half hours while the said jury was deliberating.

Said matter was presented to the District Court of Otoe County, Nebraska, in the petitioner's amendment to his motion for new trial (R. 8-9) by alleging misconduct of the jury and was especially called to the attention of the Supreme Court of the State of Nebraska in the petitioner's motion for re-hearing (R. 52-53) in the following words:

> "Because the court erroneously failed to consider or give effect to the fact that the bailiff George Johnson remained with the jury for approximately five and a half hours while the jury were deliberating this case; and because the court in its opinion and judgment makes no reference to said complaint of plaintiff in error, and has entirely disregarded this error of the case on review and for the reason that by said misconduct on the part of the bailiff and the jury, the

> plaintiff in error was prevented from having a fair trial and was prejudiced by such conduct."

Neither by its judgment or opinion did the Supreme Court of the State of Nebraska decide the said question brought to the attention of the court. It will be noted from an examination of the judgment of affirmance of the Supreme Court of the State of Nebraska, and from said opinion in said case that no reference whatsoever is made to said error, and in overruling petitioner's motion for re-hearing and denying the same the said Supreme Court refused to pass upon said question (R. 53).

This petition for a writ of certiorari is filed in this Honorable Court for the purpose of securing a review of the judgment of affirmance by the Supreme Court of the State of Nebraska and for a review of the opinion of the Supreme Court of Nebraska in connection with said judgment of affirmance of the District Court of Otoe County, Nebraska.

II.

Reasons Relied On for the Allowance of the Writ.

Petitioner says that the Supreme Court of the State of Nebraska is the highest court of law or equity in said State of Nebraska; that the judgment from which a writ of certiorari is applied for is a final judgment and presents Federal questions in this case, namely:

(a) The Fifth Amendment to the Constitution of the United States provides, in part, as follows:

> That no person shall "be deprived of life, liberty or property without due process of law." U. S. C. A. Const., Part 2, p. 517.

(b) The Sixth Amendment to the Constitution of the United States provides, in part, as follows:

> "In all criminal prosecutions, the accused shall enjoy * * * public trial, by an impartial jury of the

state and district wherein the crime shall have been committed." U. S. C. A. Const., Part 2, p. 566.

(c) The Supreme Court of the State of Nebraska decided against the petitioner and in violation of petitioner's constitutional rights, and particularly in violation of the following, the Fourteenth Amendment to the Constitution of the United States, providing, in part, as follows:

"* * * nor shall any state deprive any person of of life, liberty or property without due process of law". U. S. C. A., Const., Part 3, p. 334.

(d) Upon said question the highest courts of the States of Nebraska, Michigan, Indiana, Iowa, West Virginia, Kansas, Mississippi, Texas, Minnesota and New Jersey have reached a different conclusion from the Supreme Court of the State of Nebraska, and have held that where an outsider remains in a room with the jury during the time the jury are considering their verdict, prejudice to the accused is presumed and such action is sufficient to vitiate a verdict of guilty in a criminal prosecution, and from investigation made by petitioner's counsel, petitioner alleges and believes that said question has not been directly presented to or passed upon by this Court, but the Supreme Court of the United States, while not passing on the identical question involved herein, did cite and approve a case in the Supreme Court of the State of Michigan on the identical question in this case.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Honorable Court, directed to the Supreme Court of the State of Nebraska, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Supreme Court of the State of Nebraska had in the case numbered and entitled on its docket No. 30976, *Alfonse*

Dobrusky, Plaintiff in Error, v. *State of Nebraska, Defendant in Error,* to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States; and to the end that the judgment herein of said Supreme Court of the State of Nebraska be reversed by this Honorable Court, and for such other and further relief as to this Honorable Court may seem just and proper.

Dated February 3rd, 1942.

BERNARD M. SPENCER,
Counsel for Petitioner.